IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

TROY ANTHONY DAVIS, Petitioner, vs. CARL HUMPHREY, Warden, Georgia Diagnostic Prison, Respondent.	)))))))	Habeas Corpus Case No. _____ **EXECUTION SCHEDULED** **September 21, 2011**

PETITION FOR WRIT OF HABEAS CORPUS
UNDER O.C.G.A. §§ 9-14-41 ET SEQ

Because evidence previously unavailable to Petitioner, including new ballistics testing which contradicts the trial testimony of previously discredited firearms examiner Roger Parian,[1] reveals Mr. Davis's capital conviction and death sentence to be based on false, misleading and materially inaccurate evidence, this Court must stay Petitioner's imminent execution, hold a hearing on this Petition, and thereafter grant the Writ of Habeas Corpus.

[1] See Nelson v. Zant, 261 Ga. 358 (1991); Appendix M (Final Order, Nelson v. Zant, Butts Co. Superior Court Case No. 5387).

The jury in this case was unaware that the testimony of Kevin McQueen, who testified that Mr. Davis had confessed not only to Officer Mark MacPhail's murder but also to a shooting earlier on the night of the crime, was "patently false." The jury was also presented with what we now know to be false testimony on the part of a state ballistics examiner, Roger Parian, a previously discredited GBI ballistics examiner, who claimed that the bullets fired in that previous shooting and at Officer MacPhail may have come from the same gun – testimony which became key to the state's theory of Mr. Davis guilt and the motivation for the murder of Officer MacPhail. Finally, the jury was presented with what we now know, through the recent testimony of the lead detective on the case, to be the false testimony of Harriet Murray that she identified Mr. Davis as the murderer of Officer MacPhail from a photo array shown to her by that same detective.

In Mr. Davis's case, we know that the jury – whose only options at the time were a parolable life sentence and death -- struggled with its death verdict, taking seven hours to sentence Mr. Davis to death and only doing so after sending a key question to the court: "Under the law, what are the possible minimum and maximum durations of incarceration possible in this case if a sentence of life is

recommended, and same question for a sentence of death?" T. Sent. 92. [2] The trial court did not answer the jury's question, instead charging: "You shall not consider the question of parole. Your deliberations must be limited to whether this Defendant shall be sentenced to death or whether he shall be sentenced to life imprisonment. Your sentence whichever it may be will be carried out by the Court. That's the only instructions that I can give you." Id. The jury sentenced Mr. Davis to death the next morning. Had the jury known that key aspects of the state's case were false, or had not been exposed to this egregiously misleading evidence, there is a reasonable likelihood that Mr. Davis would not have been convicted or facing execution. As will be shown below, his execution should be stayed and his convictions and death sentence vacated.

PROCEEDINGS BELOW

On August 28, 1991, Troy Anthony Davis was convicted of the murder of Officer Mark MacPhail, two counts of aggravated assault, two counts of obstruction of a law enforcement officer, and possession of a firearm during the commission of a felony. Mr. Davis, who has unwaveringly asserted his innocence

[2] Legend: Transcript cite = "T."; Sentencing Transcript cite = "T. Sent."; Pretrial Hearing cite = "P.H."

of these charges, was sentenced to death on August 30, 1991. After the convictions were affirmed by the Supreme Court of Georgia, Davis v. State, 263 Ga. 5 (1993), the United States Supreme Court denied certiorari, Davis v. Georgia, 510 U.S. 950 (1993), and the trial court signed Mr. Davis's execution warrant.

Mr. Davis sought habeas corpus relief in the Superior Court of Butts County, Georgia. A stay of execution was granted on March 15, 1994, and an evidentiary hearing scheduled. Mr. Davis moved for a continuance due to the resignation of his counsel at the Georgia Resource Center, which had lost most of its federal funding. The state habeas court denied the motion, but the Georgia Supreme Court reversed. Davis v. Thomas, 266 Ga. 835 (1996). The Butts County Superior Court ultimately held an evidentiary hearing on December 16, 1996.

The state habeas hearing did not address actual innocence, prosecutorial misconduct or failure to investigate, but instead focused on ineffectiveness of sentencing and appellate counsel and the unconstitutionality of electrocution. Mr. Davis' habeas counsel submitted only six affidavits containing evidence supporting his innocence, and the state habeas court denied his habeas petition without considering the affidavits. Davis v. Turpin, No. 94-V-162 at 4 (September 9,

1997); R-44 at 38. The Georgia Supreme Court affirmed. Davis v. Turpin, 2736 Ga. 244 (2000).

On December 14, 2001, Mr. Davis filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Georgia. In his motion for an evidentiary hearing, Mr. Davis introduced twenty-one affidavits, all executed since the time of his trial and bearing on his actual innocence and on the unconstitutional actions by which his convictions had been obtained. The District Court then denied Mr. Davis's petition for habeas corpus, also declining to review his actual innocence claim, denied his motion to alter and amend judgment, and denied his motion for a certificate of appealability. The Eleventh Circuit Court of Appeals granted Mr. Davis's application for a certificate of appealability on September 17, 2004. Subsequently, Mr. Davis's appeal was denied by that court. Davis v. Terry, 465 F.3d 1249 (11th Cir. 2006). A petition for certiorari was later denied by the United States Supreme Court. Davis v. Terry, 127 S.Ct. 3010 (2007).

Immediately after his federal habeas appeals, Mr. Davis filed for an Extraordinary Motion for New Trial provided for under Georgia law. The trial court rejected Mr. Davis' motion and refused to hold an evidentiary hearing, citing

procedures that categorically reject recantation evidence without regard to its substance or credibility. A bare majority of the Supreme Court of Georgia affirmed, finding that an evidentiary hearing was unnecessary because State procedural rules for Extraordinary Motions for New Trial bar recantations unless extrinsic evidence shows that each recanting witness' trial testimony was the "purest fabrication." Davis v. State, 283 Ga. 438 (2008). The court examined Mr. Davis' non-recantation evidence piecemeal and without reference to the cumulative effect of all of the evidence of innocence.

A petition for writ of certiorari was filed in the United States Supreme Court on July 14, 2008, from the order of the Georgia Supreme Court affirming dismissal of the Extraordinary Motion for New Trial. The Supreme Court issued a Stay in the case on September 23, 2008, and subsequently denied certiorari on October 14, 2009. Davis v. Georgia, 130 S.Ct. 287 (2009).

After new evidence surfaced supporting Mr. Davis's innocence, he sought permission in 2008 from the Eleventh Circuit to file a second habeas petition asserting a free-standing claim of actual innocence under Herrera v. Collins, 506 U.S. 390 (1993). On April 16, 2009, a divided panel of the court denied Mr.

Davis's application pursuant to the "gatekeeping" provision of 28 U.S.C. § 2244(b)(3). In re Davis, 565 F.3d 810 (11th Cir. 2009).

In May 2009, Mr. Davis filed a new habeas petition with the United States Supreme Court pursuant to 28 U.S.C. § 2241. In his petition, Mr. Davis argued that although subsection 2244(b)(3)(E) prevented the Supreme Court from reviewing the Eleventh Circuit's decision on certiorari or direct appeal, the Court alternatively could provide Mr. Davis an evidentiary hearing by transferring his petition to the district court pursuant to 28 U.S.C. § 2241(b).

On August 17, 2009, the Court utilized its own habeas jurisdiction and transferred Mr. Davis's petition to the district court "for hearing and determination." In re Davis, 130 S. Ct. at 1 (the "Transfer Order"). The Transfer Order was the first exercise of the Court's extraordinary habeas power in nearly 50 years.

The District Court in Savannah held an evidentiary hearing in June 2010. Mr. Davis's had the burden in that proceeding of clearly establishing his innocence of the murder of Officer MacPhail. The District Court denied relief on August 24, 2010. The court denied Mr. Davis's application for a Certificate of Appealability (COA) on October 8, 2010. The Eleventh Circuit denied a COA on November 5,

2010. The United States Supreme Court denied Mr. Davis's petition for certiorari review on March 28, 2011. Davis v. Humphrey, 131 S.Ct. 1787 (2011).

On September 6, 2011, an execution warrant setting Mr. Davis's execution to take place between September 21-28, 2011, issued in the Superior Court of Chatham County. Clemency was denied on September 20, 2011. The execution is currently scheduled for September 21, 2011, at 7:00 PM.

INTRODUCTORY FACTS

In the early morning hours of August 19, 1989, Officer Mark MacPhail was murdered in a parking lot in Savannah, Georgia. The incident started when Sylvester "Red" Coles began harassing a homeless man (Larry Young) for a beer while Davis and others watched from a distance. See T. 798-99, 902-03. Coles picked a fight with the homeless man outside of a pool hall where Mr. Davis and his friends had spent the evening.

Red Coles – consistent with his reputation in the neighborhood – verbally harassed and chased Larry Young to a nearby Burger King parking lot where the victim, Officer MacPhail, was working. Troy Davis and his friends heard the

commotion and silently followed the scuffle.[3] In the parking lot, Red Coles exclaimed to the Young: "You don't know me, don't walk away from me, I'll shoot you" and began digging in his pants for a gun. T. 799, 825, 845, 878-880.

Moments after Red Coles threatened to shoot him, Larry Young was struck on the head with a pistol and yelled for the police.[4] Officer MacPhail responded to Young's cry for help and was shot dead with a .38 caliber revolver.

After initially denying to police that he had a gun, Red Coles was ultimately forced to admit that he was carrying a .38 caliber revolver on the night of the shootings. Coles was never able to produce the revolver for ballistics testing. T. 927, 1292.

An hour before Officer MacPhail was killed in the parking lot of the Greyhound bus station, Michael Cooper was shot when the car in which he was riding came under fire in Savannah's Cloverdale neighborhood. Although Mr. Davis was seen at a pool party in the Cloverdale neighborhood, Red Coles was also seen near the car shooting in Cloverdale. Trial witness Tonya Johnson

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[3] Both Larry Young and Red Coles testified that neither Troy Davis nor D.D. Collins ever uttered a word to Young, much less threatened or argued with him. T. 937, 935- 936, 825; P.H. 114.

[4] T. 802-803, 907-13, 1422-23.

unequivocally placed Red Coles at the pool party that took place in Cloverdale that evening. The party occurred down the street from where Michael Cooper's car came under fire. T. 1364. No trial witness identified Troy Davis as the car shooter.[5] After Michael Cooper was shot down the street from the party in Cloverdale, Mark Wilds, Joseph Blige, Benjamin Gordon, and Lamar Brown returned to Cloverdale and sought their retribution by shooting multiple rounds at the house where the pool party took place at 1528 Cloverdale, wounding party guest Sherman Coleman.[6]

The day after the shootings, the police had information that the shooter of Officer MacPhail ran to Red Cole's sister's house after the murder. They canvassed her home and likely tipped Coles off to that fact at the same time.[7] Late in the evening, Red Coles and his attorney approached the police to exonerate Coles and implicate Troy Davis as the shooter. T. 1313. Not knowing that Coles

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[5] Michael Cooper testified on direct that he did not see who shot him. T. 1187. Benjamin Gordon testified on direct that he did not see the person who had shot Cooper and did not know what the shooter wore. T. 1199-1203. Darrell Collins testified that he didn't see who shot Cooper. T. 1142.

[6] Appendix S, Supplemental Police Report Regarding Sherman Coleman shooting.

[7] Valerie Gordon's police statement, however, was not taken until almost two weeks on September 1, 1989. Coles sister lived at 634 Yamacraw. T. 1160. The DA's copy of an undated police information canvass sheet shows the police canvassed Coles' sister's house. Appendix E.

had been carrying a .38 caliber gun – the same caliber as the weapon that injured Michael Cooper and killed Officer MacPhail – on the night of the murder, the police never focused on Coles, instead issuing an arrest warrant for Mr. Davis and conducting a press conference. T. 927, 929, 952-53, 1331.

Shortly after the shooting, Troy Davis' picture was placed on wanted posters at the crime scene, where the persons who subsequently identified Mr. Davis as the shooter all worked and lived. These wanted posters used the same picture of Troy Davis as was thereafter shown to witnesses in the line-up compiled by detectives. See Appendices F-G. Beginning two days after Officer MacPhail was killed – before any eyewitness had made an identification – Troy Davis' picture also appeared several times in the newspaper and on television; on Monday his picture appeared under in paper under the headline: "POLICE PUSH HUNT FOR KILLER." See Appendix H. Several – if not all – of the State's witnesses likely saw Mr. Davis' photo before they were shown a photographic line-up.[8] Notably, Red Coles's picture was never included in any photo lineup.

[8] At least three witnesses volunteered the fact that they saw Mr. Davis in the media before they identified him. See Appendix I, Police Statement at 55 (Dorothy Ferrell); Appendix J at 57 (Antoine Williams statement); T. 984 (Steve Sanders). Mr. Davis' picture was posted in the Burger King and the surrounding areas next to the Grace House where Harriet Murray lived. T. 970.

Once Troy Davis' picture had been plastered on wanted posters and in the Savannah local media, the police department's high-profile commitment to the theory that Troy Davis shot Officer MacPhail precluded any investigation of Red Coles. The police never searched Coles' house or car for the murder weapon (T. 937), never included Coles' picture in witness photo spreads (T. 1327) and paraded Coles in front of four State witnesses as a mere bystander in a crime scene "reenactment" before asking the witnesses to identify the same picture of Troy Davis that had appeared on wanted posters and on television.[9]

Although the defense urged the jury to discredit the state's witnesses and look at Mr. Coles as the actual perpetrator, jury convicted Mr. Davis of murder, aggravated assault, obstruction of a law enforcement officer and possession of a firearm during a felony and sentenced him to death. The State's case rested almost completely on the testimony of several witnesses of dubious reliability, including Red Coles and witnesses who were shown the misleading lineup pictures using the

[9] Despite the evidence against Coles, the police conducted a crime scene reenactment with Coles and four witnesses. T. 1324. During the reenactment, Coles played the part of a passive onlooker to the shooting. T. 1325. After the reenactment, the police asked State witness Harriet Murray to pick out the shooter from a photographic line-up which did not include a picture of Red Coles. T 1319-1320; 1324. Both witnesses identified Mr. Davis in the photographic line-up and again at trial. The remaining two witnesses at the reenactment, D.D. Collins and Larry Young, also implicated Davis at trial.

photograph of Mr. Davis from the "wanted" poster and made to participate in a highly suggestive "reenactment" of the crime.

Now, previously unavailable evidence demonstrates that key items of evidence and testimony were totally unreliable, false, and misleading. The Writ must issue.

CLAIMS FOR RELIEF

I. PREVIOUSLY UNAVAILABLE EVIDENCE SHOWS THAT THE STATE PRESENTED FALSE AND MISLEADING EVIDENCE AND TESTIMONY AT MR. DAVIS'S CAPITAL TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ANALOGOUS PROVISIONS OF THE GEORGIA CONSTITUTION.

In Mr. Davis's case, the State presented what we now know to be false and misleading testimony on the part of state lay and expert witnesses. The presentation of such evidence "is incompatible with rudimentary demands of justice." Giglio v. United States, 405 U.S. 150, 153 (1972). When false or misleading evidence or argument is presented, reversal is required if there is "any reasonable likelihood that the false testimony could have affected the judgment of

the jury."[10] United States v. Agurs, 427 U.S. 97, 103 (1976); Napue v. Illinois, 360 U.S. 264 (1959). State took advantage of Mr. Davis's ignorance of the undisclosed favorable information by arguing to the jury that which it knew or should have known to be false and/or misleading. United States v. Sanfilippo, 564 F.2d 176, 179 (5th Cir. 1977). False or misleading testimony "is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." United States v. Bagley, 473 U.S. 667, 680, (1985).[11]

It is a prosecutor's duty not to allow materially inaccurate or misleading testimony to go uncorrected. Miller v. Pate, 386 U.S. 1 (1967). In Giglio, supra, the United States Supreme Court reaffirmed the principle that a deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the 'rudimentary demands of justice.'" 405 U.S. at 766 (citing

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[10] The "reasonable likelihood" standard is equivalent to a standard under which the false or substantially misleading testimony is material if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." United States v. Bagley, 473 U.S. 667, 680 n.9 (1985).

[11] While Petitioner contends that false evidence was presented, Petitioner also alleges that the State withheld material exculpatory evidence. Brady v. Maryland, 373 U.S. 667 (1965); Kyles v. Whitley, 514 U.S. 419 (1995). Even if he fails in his burden of showing the presentation of false testimony, Petitioner showed that there was material exculpatory evidence that was kept from the defense and there is a reasonable probability that but for the suppression the result in this case would have been different.

Mooney v. Holohan, 294 U.S. 103, 112 (1935). "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue, 360 U.S. at 269. Similarly, for Constitutional purposes, it matters not that the testimony in question may not have been technically or intentionally "false." Misleading statements made by a witness (or the prosecutor) which have a material impact on the jury's deliberations are as much in violation of the dictates of Giglio and Napue as outright perjury.[12]

Regardless of whether the State knew or should have known that it was presenting false and/or misleading evidence, the mere presentation of such evidence and the jury's reliance upon such evidence at both phases of the trial deprived Mr. Davis of due process. Sanders v. Sullivan, 863 F.2d 218 (2d Cir. 1988).[13] The pervasive injection into his capital trial of patently false and

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[12] See, e.g., Bagley, supra, 473 U.S. at 684 ("technically correct" but misleading information provided by prosecution); Alcorta v. Texas, 355 U.S. 28, 31 (1957) (outright falsity need not be shown if testimony gave the jury a false impression); U.S. v. Alzate, 47 F.3d 1103, 1109-10 (11th Cir. 1995) (Napue/Giglio rule applies where no false testimony, but misleading factual representations to court and jury on part of prosecutor); U.S. v. Barham, 595 F.2d 231, 243 n. 17 (5th Cir. 1979) ("misleading" answers reinforced by prosecutor).

[13] Moreover, should this Court believe that no state action contributed to any given instance of false or misleading testimony, and that therefore no Constitutional violation can be found, this Court should issue a stay and hold this Petition in abeyance pending the U.S. Supreme Court's disposition of Perry v. New Hampshire, Case No. 10-8974, where the question

misleading evidence, testimony and argument violated Mr. Davis's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and analogous provisions of the Georgia Constitution.

A. A Federal Court has Found That the State Presented "Patently False" Testimony by Kevin McQueen That Mr. Davis Had Confessed to Both the Shooting of Michael Cooper and the Murder of Officer Mark MacPhail.

At Mr. Davis's trial, the state presented testimony of a jailhouse snitch named Kevin McQueen which the state knew or should have known was absolutely false.[14] According to the District Court in its 2010 order, Mr. McQueen testified "patently false[ly]"[15] at trial that Mr. Davis had confessed to him, at the Chatham County Jail to a shooting in the Cloverdale neighborhood and to the murder of Officer MacPhail. See T. 1230-32. Specifically, McQueen testified that Mr. Davis told him that Mr. Davis had shot someone at a party in the Cloverdale

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on which certiorari was granted involves whether a due process violation occurs even in the absence of state action when a witness presents unreliable testimony at trial.

[14] The state conceded to the trial court that McQueen had been a "snitch" in other prosecutions. T. 1228.

[15] See Appendix K at 150.

neighborhood of Savannah, that he had then gone to the Burger King near Yamacraw Village at which point he got in a fight with someone, drawing the attention of Officer MacPhail, at which point Mr. Davis shot the officer to death. Id. According to McQueen, Mr. Davis claimed that the motivation for shooting Officer MacPhail was that "he was afraid that they seen him about that night at Cloverdale. He was on his way out of town also, to Atlanta." Id. at 1233. McQueen thus linked Mr. Davis to shootings of both Michael Cooper at Cloverdale and Officer MacPhail near Yamacraw Village. Importantly, Mr. McQueen provided the only testimony affirmatively linking Mr. Davis to the shooting of Michael Cooper in Cloverdale.

The prosecutor vigorously cross-examined Mr. Davis at trial about his denial of having made such admissions to McQueen. See T. 1458-59. In closing argument, the prosecutor called Mr. Davis's denials "lies" and relied on McQueen's testimony to establish Mr. Davis's guilt of both the Michael Cooper shooting and Officer MacPhail's murder:

> I told you in the opening statement that you would hear testimony from others to whom Troy Anthony Davis had openly confessed, even boasted, of the fact that he had done these crimes. You heard from Kevin McQueen. Kevin McQueen was ... the jailbird. Well, if you're going to talk to Troy Anthony Davis about what he did, you've got to be where Troy Anthony Davis is, and Kevin McQueen told you that

> he was told by Troy Anthony Davis that he had shot into the car that Michael Cooper was riding in in Cloverdale, and Troy Anthony Davis told him that Davis had shot Officer McPhail. *There's not a reason on earth to doubt his word. There was nothing, no reason why he had to be here, except that we subpoenaed him when we learned what he had to say.*

T. 1501 (emphasis supplied).

The state's tactics forced the defense to try to refute the allegations that Mr. Davis had been the perpetrator at both the Cloverdale and MacPhail crime scenes. Defense attorney Falligant told the jury:

> [T]he Michael Cooper case is the case they're trying to bootstrap the McPhail case with. Because it wasn't enough to indict him for the death of Officer McPhail, because the evidence is not beyond a reasonable doubt.....
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> This is a concocted story, that he concocted and sent word out of the jail in hopes, I submit to you, to gain favor and possibly an early release, some consideration on a future case that he might become involved in.....
>
> I don't know why they even put a man like Kevin McQueen on the stand.... But it was done to prejudice you.

T. 1527, 1536-37.

In rebuttal, prosecutor Lawton relied explicitly on McQueen's testimony to establish Mr. Davis's purported motive for the MacPhail shooting:

> Mr. Falligant suggested that the police depended upon the Cloverdale incident, you know, bootstrapping the entire rest of the case, that is to say, the attack on Larry Young and the murder of Officer McPhail, on that Cloverdale incident. Again, that's just simply not the case.
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> *In fact ... one of the most significant things about the Cloverdale incident is that it does in fact provide – it's illustrative of a motive that Davis may have had, a motive that cannot be ascribed to Coles, a motive that Davis may have had for shooting Officer McPhail, quite out of fear that he would be arrested and connected with the Cloverdale incident, unless he could escape Officer McPhail*.

T. 1552-53 (emphasis supplied).

On appeal, the Georgia Supreme Court explicitly relied on McQueen's testimony in affirming Mr. Davis's conviction and death sentence. See Davis, 263 Ga. at 6.

In 1996, Kevin McQueen admitted that he had had a falling out with Mr. Davis prior to giving his statement to Det. Gregory Ramsey, that he had implicated Mr. Davis in order to get back at him, and that "[t]he truth is that Troy never confessed to me or talked to me about the shooting of the police officer. I made up the confession from information I had heard on TV and from other inmate's talk about the crimes. Troy did not tell me any of this." Appendix L. Throughout state and federal habeas proceedings, the state maintained, in the face of Mr. McQueen's

recantation, that Mr. McQueen's trial testimony was perfectly reliable and that his recantation was incredible.

It was not until after Mr. McQueen testified at the June 2010 hearing in the Federal District Court in Savannah that District Court Judge William Moore made the unequivocal finding that Mr. McQueen's recantation was credible and that his trial testimony was **"patently false"** and that this should have been obvious to the state at the time of trial. Appendix K at 150 (emphasis supplied). A judicial finding that Mr. McQueen presented false testimony was obviously previously unavailable to Mr. Davis.

Kevin McQueen's false testimony renders Mr. Davis's conviction and death sentence fundamentally unfair and unreliable, in violation of Due Process and the Fifth, Sixth, Eighth and Fourteenth Amendments. See Giglio v. United States,; Napue v. Illinois, supra. A court reviewing a Brady/Giglio/Napue claim must "consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case." Bagley, 473 U.S. at 683. Here, McQueen's undisputedly false testimony forced the defense to confront an apparent admission by Mr. Davis that he had perpetrated two shootings on the night of the crime, and that the motive for the murder of Officer MacPhail

was inextricably tied to Mr. Davis's alleged shooting of Michael Cooper in Cloverdale. Now it is clear that Mr. Davis never should have had to confront this evidence as it was completely false.

There is clearly a reasonable likelihood that McQueen's false testimony impacted the jurors' deliberations at either phase of trial. See Bagley, 473 U.S. at 679-80. McQueen provided a confession by Mr. Davis to the MacPhail murder and a clear link between Mr. Davis and the two shooting scenes, and, moreover, provided the prosecution with an argument as to why Mr. Davis may have been motivated to kill Officer MacPhail. Further, "[l]ingering doubts as to whether the murder was premeditated can be an important factor when the jurors consider whether to recommend the death penalty." Dobbs v. Turpin, 142 F.3d 1383, 1389 (1998) (quoting Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987)).[16] No other testimony provided a motive for Officer MacPhail's shooting.

The false impression created by the McQueen's testimony was not harmless beyond a reasonable doubt in that there is a reasonable possibility that it affected

[16] Even under the Brady standard of materiality, which is coterminous with the prejudice standard under Strickland v. Washington, 466 U.S. 668 (1984) (see Strickland, 466 U.S. at 694), the test for reversal of the death sentence in such circumstances is whether "at least one juror would have struck a different balance" but for the error. See Wiggins v. Smith, 539 U.S. 510, 537 (2003).

the jury's deliberations at either phase of trial. Had counsel been free to attack other weaknesses in the state's case and focus more effectively on the alternative suspect in this case, Sylvester "Red" Coles, counsel would have been in a far superior position to persuade the jury to acquit Mr. Davis or sentence him to life. Mr. Davis "is entitled to put his defense forward free of the prosecutorial misconduct which occurred in this case. . . . It may be that [Mr. Davis] will be convicted [or sentenced to death] after a fair trial. We do not know, but we do know that he has not yet had one." Alzate, 47 F.3d at 1110-11 (false impression imparted to jury not "harmless beyond a reasonable doubt," and new trial was warranted) (Carnes, J., delivering opinion of the court).

Mr. Davis is entitled to a Writ vacating his convictions and death sentence.

B. New Ballistics Testing Requested *Sua Sponte* by the Board of Pardons and Paroles Establishes that the State Presented the False and Misleading Testimony at Trial of Roger Parian, Ballistics Expert, that the Bullets which Hit Michael Cooper and Officer MacPhail May Have Been Fired From the Same Gun.

One of the state's key claims at trial was that the same gun used to shoot Officer MacPhail was also used in the first of two shootings earlier that evening in another neighborhood known as Cloverdale—and that this "fact" implicates Mr.

Davis—has now been called into serious doubt. The state attempted to link the two crimes based on "expert" findings. The state had a ballistics examiner, Roger Parian,[17] testify that there were enough similarities between a bullet fired in Cloverdale and a bullet removed from the officer's body that the bullets may have been fired from the same gun. Since Mr. Davis lived in Cloverdale and was at a party near the Cloverdale shooting that night, the state argued that its "same gun" evidence showed that he committed both crimes and that he was motivated to shoot the officer because he feared arrest for the earlier Cloverdale shooting.

The state's "same gun" theory is no longer viable. A new report prepared by the Georgia Bureau of Investigation years later at the request of the Board of Pardons and Paroles[18] shows that the markings on the two bullets are insufficient to determine that they were fired from the same gun. See Appendix A (2007 GBI ballistics testing reports). Former Georgia Bureau of Investigation firearms

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[17] In 1991, the Georgia Supreme Court found that Parian had given false and misleading testimony about the similarity of hairs in the case of Nelson v. Zant, 261 Ga. 358 (1991). The state had known that FBI examination of the hairs showed that they were unsuitable for comparison. Id. at 360. The Court granted relief, reversing the denial of relief by the state habeas court in that case. See Nelson v. Zant, Butts Co. Superior Court Case No. 5387, Order of May 25, 1990 at 7 (attached as Appendix M).

[18] See Appendix O (correspondence between Chatham County prosecutor and legal counsel for the Board of Pardons and Paroles).

examiner Christopher Robinson confirms that the 2007 GBI reports show that the state's "same gun" testimony at trial was **"inaccurate and misleading,"** and that the 2007 GBI report **"indicates that it is impossible to tell whether the bullets were fired from the same firearm."** See Appendix N (Affidavit of Christopher Robinson). This directly rebuts the state's claim that there was a link between the shootings or, more importantly, that therefore Mr. Davis had any motive to shoot Officer MacPhail.

The evidence at trial showed that two hours before Officer MacPhail was killed, Michael Cooper suffered a non-fatal bullet wound in Savannah's Cloverdale neighborhood. The shooting occurred down the street from a pool party. Cooper and four of his friends (Benjamin Gordon, Joseph Blige, Lamar Brown, and Mark Wilds) were driving away from the party when Blige hung his head out the window; moments later, the car came under fire and Cooper was shot in the jaw. T. 1198-99.

The police were convinced early on in the investigation that the two crimes were linked. A preliminary report from a nearby crime lab concluded that the bullet retrieved from Michael Cooper's jaw and the bullet found in Officer

MacPhail's body "were probably fired from the same weapon."[19] Although that conclusion turned out to be false, it led the police to conclude there was a connection between the MacPhail murder and the Cloverdale shooting.[20]

At trial, a state expert, Roger Parian, connected a bullet taken from Officer MacPhail's body and a bullet taken from the jaw of Michael Cooper, who was shot in the initial Cloverdale shooting, as possibly having been fired from the same gun. T. 1292. The prosecution used this expert testimony to argue that Mr. Davis, "using the same gun, [shot] Michael Cooper and murder[ed] Officer MacPhail" and claimed that the Cloverdale shooting was "*a motive* that Davis may have had, a motive that cannot be ascribed to Coles, a motive that Davis may have had for shooting Officer MacPhail . . . out of fear that he would [have been] arrested and connected with the Cloverdale incident, unless he could escape Officer MacPhail." T. 1502, 1552-53 (emphasis supplied).

The GBI, however, retested those bullets in 2007 at the request of the Board of Pardons and Paroles. The new ballistics report concluded that there were not "enough similarities in the bullets" to connect the Cloverdale bullet with the bullet

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[19] Appendix P (Det. Ramsey police report) at 20.

[20] Id. at 16.

that killed Officer MacPhail, finding that "[m]icroscopic examination and comparison fails to reveal sufficient characteristics to determine that the [bullet found in Michael Cooper], and the [bullet shot into the body of Officer MacPhail], were fired from the same firearm."[21]

Former GBI forensic examiner Christopher Robinson confirms that the 2007 GBI report shows that the expert trial testimony on which the jury relied was "inaccurate and misleading," and that the 2007 GBI report "indicates that it is impossible to tell whether the bullets were fired from the same firearm."[22] Mr. Robinson explains that the MacPhail and Cooper bullets "may have been fired from the same *model* of firearm, because the same firearm *model* may cause similar markings. But the .38 special revolver is and was an extremely common firearm."[23] Without matching bullets, the state would have had no concrete link between the Cooper shooting and the murder of Officer MacPhail.

In light of the state's steady focus, both in its case in chief and in argument to the jury, on the shooting of Michael Cooper and its link to the murder of Officer

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[21] Appendix A.

[22] Appendix N at ¶¶ 10-11.

[23] Id. at ¶ 11.

MacPhail, there is a reasonable likelihood that the false and misleading testimony of Roger Parian impacted the deliberations of the jurors at either phase of trial. See Bagley, 473 U.S. at 679-80. The evidence as presented at trial provided a basis for jurors to believe that Mr. Davis was on a shooting "spree" on the night of Officer MacPhail's murder and that the Cooper shooting provided the motive to kill Officer MacPhail. Roger Parian's false, misleading testimony was not harmless beyond a reasonable doubt and, even under the more stringent Brady standard, there is a reasonable probability of a different outcome had the jury known that there was no link between the crime scenes. Without this evidence, the defense could have focused on levying a far more effective attack on the dubious reliability of the witnesses who linked Mr. Davis to the murder of Officer MacPhail, and more effectively focused on the possibility that Red Coles had murdered Officer MacPhail.

Indeed, the Georgia Supreme Court relied on this evidence in upholding Mr. Davis's conviction and death sentence:

> Here, all the offenses are connected: they occurred the same evening; the same gun was involved; the second assault was the reason the victim tried to arrest the defendant; and there was some evidence that one reason he shot the officer was because he was afraid he had been seen in the area where the first assault had occurred.

Davis, 263 Ga. at 6.

Importantly, the state knew or should have known that Mr. Parian was prone to falsely claim similarities between items of physical evidence. In the case of Gary Nelson, another Georgia death sentenced prisoner, Parian had claimed at Nelson's late 1970's trial that hairs found on the victim's body could have come from Nelson or "about 120 people in the Savannah area."[24] However, testing of the hairs by the FBI in 1978, of which the state was aware, showed the opposite, that the hairs were "not suitable for significant comparison purposes" and that such hairs "lack sufficient individual microscopic characteristics to be used for significant comparison purposes." Nelson, 261 Ga. at 360. The Georgia Supreme Court granted relief under Brady v. Maryland because the hair evidence was an important part of an otherwise "circumstantial-evidence case," and that had the defense known that the hair comparison was so unreliable, it could have shown that the evidence "had no probative value at all." Id. at 361.

This case is like Nelson and even involves the same forensic analyst, Roger Parian. Roger Parian's false, misleading testimony and the state's argument based

[24] Nelson, 261 Ga. at 360.

on that testimony render Mr. Davis's conviction and death sentence completely unreliable, unfair and unconstitutional. The Writ must issue.

C. The Lead Police Detective Has Finally Admitted that a Key Witness Never Identified Mr. Davis as the Person who Shot Officer MacPhail, Contrary to Her Testimony at Trial.

Harriet Murray was a key witness at trial against Mr. Davis. She was with Larry Young at the Burger King parking lot when Mr. Young was assaulted. She purportedly witnessed the shooting of Officer MacPhail. Her testimony that she picked Mr. Davis out of a photo array shown to her by Detective Gregory Ramsey was relied upon by the state to argue to the jury that Mr. Davis was the shooter. At the 2010 evidentiary hearing in the District Court in Savannah, however, Det. Gregory Ramsey finally admitted that, contrary to her trial testimony, Ms. Murray never identified Mr. Davis as the shooter. Moreover, the record shows clearly that neither Det. Ramsey nor the prosecution corrected her false, misleading testimony at trial.

Ms. Murray told the jury that on August 24, 1989 she identified Mr. Davis as the shooter of Officer MacPhail. T. 865. During the 2010 evidentiary hearing in Federal District Court, Detective Ramsey, for the first time, testified that Ms. Murray could only identify Mr. Davis as "one of the three individuals present

when Young was assaulted."[25] Detective Ramsey explained Ms. Murray's August 24, 1989 "identification:"

> Q [W]hen [Ms. Murray] looked at Troy Davis' picture she did not say, I saw that man shoot the officer?
>
> A (Det. Ramsey): That's correct.
>
> Q And she did not say, I saw that man hit Mr. Young?
>
> A She said she couldn't put a face with the person.
>
> Q So she couldn't say who it was that had shot the officer or hit Mr. Young; correct?
>
> A That was my impression.[26]

Ms. Murray testified at trial that on August 24, 1989 she identified Mr. Davis as the person who assaulted Larry Young and shot Officer MacPhail:

> Q Okay, why did you pick out the [picture] you picked out?
>
> A (Murray) Because that's the one looked like the guy that had hit Larry and shot the police, and it's that picture, like when I first looked at it, I got real shaken up when I looked at it..... Nervous. Shaked up.

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[25] Appendix R, Evidentiary Hearing Transcript Volume 2 (6/24/2010) at 394, *In re Davis*, No. CV409-130 (S.D. Ga. Aug. 24, 2010).

[26] Appendix R, Evidentiary Hearing Transcript Volume 2 (6/24/2010) at 395, *In re Davis*, No. CV409-130 (S.D. Ga. Aug. 24, 2010).

> Q Was there anything in particular about this photograph that made it stand out in your mind?
>
> A The narrow face and it was the same person that hit Larry and shot the police.

T. 865.

Ms. Murray was not asked to identify Mr. Davis again until trial.

The state pointed out to the jury at trial that Murray saw both the assault of Larry Young and the murder of Officer MacPhail and "was only feet away" from the shooter during the course of events. T. 1498. Ms. Murray was the first witness to the shooting mentioned by the prosecution in closing arguments when the State repeated her testimony: **"So who did Harriet Murray tell the police hit Larry? Troy Anthony Davis. . . . Who did Harriet Murray tell the police shot Officer MacPhail? Troy Anthony Davis."** Id.

When the state examined Detective Ramsey at trial, he testified that Ms. Murray "selected photograph number five, that being of Troy Davis." T. 1319. He failed to clarify, however, that she identified Mr. Davis as "one of the three individuals present when Young was assaulted," as he explained in the 2010

evidentiary hearing.[27] On cross-examination at trial, Detective Ramsey explained that Ms. Murray was taken to a crime scene reenactment in which she and other witnesses attempted to agree on where the shooter was standing. T. 1325-26. Ramsey testified at trial that during the reenactment that occurred prior to Ms. Murray's identification of Mr. Davis that she "could not put a face on" the person standing to the right of Mr. Young -- the position she claimed the shooter stood. T. 1326. After the reenactment, Ms. Murray was asked to view the photo array containing Mr. Davis's picture. Detective Ramsey *never corrected* Ms. Murray's misleading and inaccurate testimony that she had not, in fact identified Mr. Davis in the photo array.[28] The state's failure to correct what they knew to be false and misleading testimony blatantly violated the state's clear duty as well as Mr. Davis's Constitutional right to a fair trial and reliable sentencing.

There is a reasonable likelihood that Ms. Murray's false, misleading testimony affected the jurors' deliberations at either phase of trial,[29] and a

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[27] Evidentiary Hearing Transcript Volume 2 (6/24/2010) at 394, *In re Davis*, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010) (ECF # 83).

[28] See T. 1319, 1325-26.

[29] See Bagley, 473 U.S. at 679-80.

reasonable probability that the outcome of the trial would have been different, had Det. Ramsey or the prosecution corrected what they knew was a patently incorrect eyewitness identification of Troy Davis as the killer of Officer MacPhail. Even under the Brady reasonable probability standard, the issue is whether this Court can be confident in the reliability of verdicts tainted by the false testimony or improperly suppressed material which would have undermined the credibility of a key state witness. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." Kyles, 514 U.S. at 434-35. Furthermore, "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others." Id. at 469. Indeed, here, "[d]amage to the prosecution's case would not have been confined to evidence of the eyewitness[], for [the revelation that Ms. Murray had not in fact identified Mr. Davis as the shooter] would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well." Id. at 445.

A jury enlightened as to Ms. Murray's lack of trustworthiness, as demonstrated by her false testimony regarding her identification of Mr. Davis, could reasonably be expected to distrust other aspects of her testimony and other witnesses' testimony. Armed with evidence of one lie on the stand, competent counsel could have caused the jury to doubt the veracity of the entire body of the Ms. Murray's testimony and provided a clear basis to distrust other aspects of the state's case. Here, as in United States v. Bernal-Obeso, 989 F.2d 331 (9th Cir. 1993), "[e]vidence of such a lie might be equivalent to the proverbial smoking gun. All the other evidence used by the defense to punch holes in [the witness'] credibility [might amount] only to circumstantial reasons why [the witness] might alter the truth to feather his own nest. A lie would be direct proof of this concern, eliminating the need for inferences." 989 F.2d at 336.[30]

Individually or cumulatively,[31] the errors raised in Claim I of this Petition mandate relief. The state obtained Mr. Davis's conviction and death sentence on

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[30] See also, Kyles, 514 U.S. at 443 n.14: "Inconsistencies between the two bodies of trial testimony provided opportunities for chipping away on cross-examination but not for the assault that was warranted."

[31] See Kyles, 514 U.S. at 421 (materiality analysis under Brady standard must involve cumulative, not just item-by-item, assessment of the undisclosed evidence).

the basis of "patently false," misleading, and materially inaccurate evidence which knowingly or negligently presented and whose misleading nature was kept from the defense, the trial court and the jury in violation of his right to a fair and reliable capital trial and sentencing, as mandated by the United States and Georgia Constitutions. The misleading, inaccurate and false testimony and evidence presented to the jury was not harmless beyond a reasonable doubt. This Court can no longer have confidence in the reliability of Mr. Davis's conviction or death sentence, in light of the newly available evidence recounted above, and therefore the Writ must issue.

II. MR. DAVIS'S DEATH SENTENCE IS PREDICATED ON MATERIALLY INACCURATE INFORMATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ANALOGOUS PROVISIONS OF THE GEORGIA CONSTITUTION, AND JOHNSON V. MISSISSIPPI, 486 U.S. 578 (1988).

All allegations and claims set forth above are incorporated into this claim by this reference.

The previously unavailable evidence described in Claim I – the testimony of jailhouse snitch Kevin McQueen, the testimony of ballistics expert Roger Parian, and the testimony of Harriet Murray – formed key parts of the state's case for

Troy Davis's guilt and, perforce, the sentence of death imposed on him by the jury. Newly available evidence has revealed that the testimony of these witnesses was "patently false" and otherwise at best egregiously misleading and materially inaccurate. Mr. Davis never confessed to Kevin McQueen. The bullets recovered from Michael Cooper and Officer MacPhail were not fired from the same gun. Harriet Murray never picked Troy Davis out of a photo array as the shooter of Officer MacPhail. The Constitution forbids the imposition of the death sentence where it is based on such "materially inaccurate" information. See Johnson v. Mississippi, 486 U.S. 578 (1988) (death sentence predicated on "materially inaccurate" information violates Eighth Amendment).

In Johnson, the defendant's death sentence was predicated in part on a prior felony conviction which was subsequently vacated. The Court reversed Johnson's death sentence because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Johnson, 486 U.S. at 590. The Court reasoned that "the fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate

punishment' in any capital case." Johnson, 486 U.S. at 584 (quoting Gardner v. Florida, 430 U.S. 349 (1977)).

Clearly, the fact that Mr. Davis's death sentence rests in part on "patently false" and egregiously inaccurate and misleading testimony, evidence and argument renders the death sentence fundamentally unfair, unreliable and therefore violative of the Eighth and Fourteenth Amendments. Here, as in Johnson, the "fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment" mandates that Mr. Davis's execution be stayed and his death sentence be vacated.

WHEREFORE, Petitioner respectfully prays that this Court:

1. Issue a stay of execution;

2. Issue a writ of habeas corpus to have Petitioner brought before it to the end that he may be relieved of his unconstitutional convictions sentence of death;

3. Conduct a hearing at which further proof may be offered concerning the allegations of this petition;

4. Allow Petitioner a period of at least 90 days after the completion of the transcript of any hearing this Court shall determine to conduct, in which to brief the issues of law raised by this petition;

5. Grant such other relief as may be appropriate.

Dated this 21st day of September, 2011.

Respectfully submitted,

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404-222-9202

COUNSEL FOR PETITIONER

IN THE SUPERIOR COURT OF BUTTS COUNTY
STATE OF GEORGIA

TROY ANTHONY DAVIS, Petitioner,	)	
v.	)	Habeas Corpus Case No. _____
CARL HUMPHREY, Warden, Georgia Diagnostic Prison, Respondent.	)	**EXECUTION SCHEDULED** **September 21, 2011**

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by hand delivery and/or electronic transmission, on counsel for Respondent at the following address:

Beth Burton, Esq.
Senior Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300

This the 21st day of September, 2011.

_____
Attorney